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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128

AMERICAN PUBLIC COMMUNICATIONS COUNCIL'S OPPOSITION TO PETITIONS FOR RECONSIDERATION OF AT&T, 800 NUMBER SUBSCRIBERS, AND PAGING SERVICE PROVIDERS

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SUMMARY

Petitioners fail to make a persuasive case that the deregulated local coin rate, with cost adjustments, is not an appropriate basis for compensating subscriber 800 calls. On the contrary, this approach is permissible under the Court of Appeals partial remand opinion. More fundamentally, the Commission should maintain a payphone compensation system under which the rate for a call is set by the marketplace.

The petitioners are wrong in arguing that the appellate court's opinion precludes the Commission from adopting the local coin rate as a market-based compensation rate for "dial-around calls." The Court found that the Commission failed to address record evidence indicating that the costs of the two types of calls are not similar. On remand, the Commission expressly addressed this ruling by the Court by examining in detail the cost relationships between local coin calls and dial-around calls. The Commission decided to continue to tie dial-around compensation to a market-based rate (the local coin rate), but to adjust the rate to take account of the cost difference between the two types of calls. The Commission therefore set dial-around compensation at a level 6.6 cents less than the local coin rate.

Petitioners also fail in their attempts to raise doubts about the relationship in the marketplace between local coin calls and dial-around calls. Contrary to petitioners' arguments that these calls are two separate "goods," there are obvious and important similarities between local coin calls and dial-around calls that amply justify the FCC's decision to use the local coin rate as a benchmark, at least in absence of a better surrogate. The seller in both cases -- the payphone provider -- is the same. The product in both cases -- use of the payphone to originate a call -- is also the same. By permitting interexchange carriers ("IXCs") and their customers to

pass a payphone compensation surcharge to the caller who makes the call from a payphone, the Commission's rules put the caller in charge so that he/she can decide whether to incur the economic consequences of making a call from a payphone. Thus, the local coin rate is a viable, market-based surrogate.

Some petitioners claim that the Commission was also precluded from adopting any market-based surrogate or benchmark, as opposed to pure cost analysis, in the first place. This concern is simply not expressed in the Court's opinion. The Court neither indicated that a market-based rate could not serve as a benchmark for setting the dial-around rate, nor did it hold that the deregulated local coin rate was not an appropriate market-based benchmark, provided that the issue of cost differences was addressed by the Commission. In addition, the use of surrogates to predict behavior in the marketplace is a well-accepted practice in regulation. In this proceeding, the Commission had several equally viable market-based surrogates from which to choose. Therefore, the Commission was correct in relying on a market-based surrogate for establishing a payphone compensation system.

Apart from the other market-based surrogates that it could have used, the prevailing $0.35 local coin rate, especially with the cost adjustments made by the Commission, provides a compensation rate that APCC believes is at the low end of the range of possible market-based rates. As such, it represents the Commission's adoption of a compromise between the payphone service providers ("PSPs") and other members of the industry. Reliance on the local coin rate surrogate was in the public interest, however, because it produced a "fair" compensation rate that allows a more flexible, conceptually easy transition from the subsidy-ridden payphone operations of the past to the current competitive marketplace. The petitioners fail to acknowledge this point.

Petitioners' arguments for a "bottom-up" cost analysis, as an "alternative" to market-based compensation, are just another way of attempting to focus the Commission on an incremental cost standard and TELRIC pricing, which were previously rejected by the Commission. If the Commission elects, however, to employ a cost-based study for any purpose in this proceeding, it must engage in proper economic analysis. Petitioners' criticisms of the data the Commission relied on in its order reveal their intent to eviscerate any meaningful inquiry by the Commission into a PSP's actual costs. They advance a number of flawed, unreliable "studies" that purport to show local exchange carrier ("LEC") "costs" in originating payphone calls that will do little to support the Commission's analysis. Instead, the Commission should continue to rely on the cost data submitted by the leading independent PSPs, the forward-looking companies that are the leaders of the payphone industry. In addition, the Commission has the option of relying on the indepth data from a state proceeding that looked at the payphone costs of all PSPs -- both LEC and independent.

Petitioners are mistaken as well when they argue that further reductions to the Commission's $0.284 market-based compensation rate are warranted. The Commission should not make any reductions to this rate, but should, instead, make the upward adjustments suggested by APCC and other PSPs that would achieve a more accurate market-based rate. In either case, $0.35, the prevailing local coin rate since deregulation, should remain the starting point for the Commission's analysis, not the $0.25 rate urged by petitioners -- the deregulated rate in just two states.

Finally, a number of the petitioners raise arguments at this juncture that are effectively moot. The appellate court's remand of the Commission's payphone orders was a limited remand that allows the Commission to correct the identified problems while keeping the general payphone compensation framework intact. The petitioners urge the Commission to undo what has already been decided and upheld by the appellate court. In a similar vein, some petitioners propose possible approaches to payphone compensation that are outside the scope of the Commission's responsibilities on remand. To determine whether or not these are actually viable approaches that would benefit the public interest at some point, the Commission would need to conduct an inquiry or inquiries that could continue on indefinitely. To the extent that they have any merit, these last-minute proposals are more appropriately the subject of a future proceeding, if the Commission chooses to examine them. The Commission must now act, however, on the more pressing compensation issues currently remanded to it.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	CC Docket No. 96-128

AMERICAN PUBLIC COMMUNICATIONS COUNCIL'S OPPOSITION TO PETITIONS FOR RECONSIDERATION OF AT&T, 800 NUMBER SUBSCRIBERS, AND PAGING SERVICE PROVIDERS

The American Public Communications Council ("APCC") hereby opposes the petitions filed by AT&T Corp. ("AT&T"), various 800 number subscribers ("800 subscribers")[1] and paging service providers[2] requesting reconsideration of the Second Report and Order ("Remand Order" or "IPTA") in this proceeding.[3]

The attacks by AT&T, the paging industry, and 800 subscribers are without merit. Their statements that the per-call compensation rate adopted by the Commission in its Second Report

[1] The Consumer-Business Coalition for Fair Payphone-800 Fees ("CBC") and The Direct Marketing Association ("DMA").

[2] All Office Support, Inc. ("AOS"); American Alpha Dispatch Systems et al. ("AADS"); Mobile Technologies Corp. ("Mtel"); PageMart Wireless, Inc. ("PageMart"); Paging Network, Inc. ("PageNet"); Source One Wireless II, LLC ("Source One").

[3] Illinois Public Telephone Association v. FCC, 117 F.3d 585 (D.C. Cir. 1997). Other petitions for reconsideration, which APCC does not specifically address, are those filed by People's Telephone Company ("Peoples"), the RBOC/GTE/SNET Payphone Coalition ("the RBOCs"), and APCC itself.

and Order is a "windfall" for payphone service providers ("PSPs") that will have a "severe impact" on payphone callers ring hollow.

Contrary to these attacks, the Commission has adopted a payphone compensation system that will achieve Congress' mandate: that PSPs receive "fair" compensation for "each and every completed intrastate and interstate call" in a manner that will ensure the "widespread deployment of payphones to the benefit of the general public." 47 U.S.C. Section 276(b)(1).

The arguments of AT&T notwithstanding, the Commission was correct, both as a matter of law and public policy, in choosing a per-call compensation rate for coinless, dial-around calls that is based on a surrogate for how the competitive marketplace would value the call. From a number of possible market-based surrogates, each of them a "correct" option for determining the value to a caller of being able to make a payphone call, the Commission selected a single surrogate -- that of the deregulated local coin rate -- as a default compensation rate for a dial-around call. The Commission then adjusted this per-call rate to account for some basic cost differences between local coin calls and dial-around calls.

The petitioners, primarily AT&T, launch a strong but unpersuasive attack on the economic underpinnings of the Commission's Second Report and Order. The attack has three basic prongs. First, AT&T relies on a strained and complicated economic analysis that tries to show that local coin calls and subscriber 800 calls are two separate goods that share different market characteristics. Common sense provides the rejoinder to this argument -- both "goods" are sold by a payphone provider; both "goods" in question are the use of a payphone to originate a call; and under the Commission's regime, the cost of both "goods" can be charged to the caller, who makes the economic decision of whether to place the call and then incurs the consequences of this decision.

Second, AT&T seems to suggest between the lines of its argument that the use of <u>any</u> market-based surrogate to determine a level of compensation is improper. Its views are unconvincing. The use of market-based surrogates to measure and attempt to replicate a market result is a well-accepted practice in regulatory law. In this proceeding, the Commission has on the record <u>several</u> market-based surrogates that reliably track the market for dial-around calls. In its expertise and discretion, it could have chosen <u>any</u> of these surrogates. APCC submits that some of the other surrogates would have yielded a higher compensation rate; the local coin rate as a surrogate yields, if anything, too low of a compensation rate.

Finally, after attempting to sweep aside all viable market-based compensation surrogates, AT&T returns to its old standby proposal, as if it were the only alternative remaining: that per-call compensation rates be cost-based. At first glance, this particular argument has a superficial appeal, but this appeal quickly fades with closer examination. It is clear from its petition that AT&T is making the same tired, IXCs-should-pay-less argument that it has advanced throughout this proceeding. This argument in the past has been styled as an incremental cost standard or TELRIC pricing. Now the argument is styled as one that relies on local exchange carrier ("LEC") "costs" in originating payphone calls. But no matter how much it is dressed up, this argument seems to mean that PSPs get something less than the "fair" compensation, which the Communications Act mandated. This pay-less argument also means that callers everywhere get shafted -- there will be no "widespread deployment of payphones" without a "fair," economically-rational compensation rate.

Try as they may, AT&T and other petitioners do not present a convincing picture of why increased caller choice in a competitive marketplace is a bad thing. Instead, their attack in some respects vindicates the Commission's choice of the local coin rate as the basis for a default compensation rate for dial-around calls. To effectuate the transition to a market-based pricing for payphone calls, the Commission chose a market-based surrogate -- the local coin rate -- that has both a common-sense economic simplicity and a price that callers are already accustomed to paying.

Some petitioners have asked the Commission to reconsider issues that are either peripheral or beyond the scope of the Commission's notice of proposed rulemaking ("NPRM"). None of these issues rise to the level of importance that requires them to be addressed in any significant detail at this juncture. Instead, some of the issues may be taken up by the Commission in a subsequent proceeding in the future. In no case do they warrant diverting the Commission's resources from adopting a market-based compensation rate for dial-around calls, while at the same time responding to the Court's remand opinion.

I. DISCARDING A MARKET-BASED COMPENSATION RATE, AS SOME PETITIONERS URGE, WOULD BE CONTRARY TO GOOD PUBLIC POLICY AND THE STATUTORY OBLIGATION TO ENSURE FAIR COMPENSATION

On reconsideration, the Commission should reject arguments by AT&T and other petitioners that the deregulated local coin rate, with appropriate cost adjustments, is not an appropriate basis for compensating subscriber 800 calls. This approach is permissible under the Court of Appeals partial remand opinion. More fundamentally, the Commission should maintain a payphone compensation system under which the rate for a call is set by the marketplace. Contrary to arguments by some petitioners, the deregulated local coin rate and additional measures of the value to a payphone caller of being able to make a coinless call, such as those suggested by APCC and others, all support the marketplace approach.

AT&T's arguments, which it supports with an economist's affidavit -- previously unchallenged only because AT&T conveniently filed it in the reply round of comments -- and second-hand cost "studies," fail in their effort to raise doubts about whether the deregulated local coin rate can serve effectively as a market-based surrogate in light of the Court of Appeals' decision in IPTA. And rightfully so; the Commission should have no such doubts. It recognized its statutory obligation to ensure fair compensation for all payphone calls in a manner that will promote the "widespread deployment of payphones to the benefit of the general public." 47 U.S.C. Section 276(b).

AT&T next launches a broad-based attack on the use of market surrogates as a basis for dial-around call compensation. After attempting to shoot down the local coin rate as not being an appropriate surrogate for market-based compensation, AT&T does not propose a single market-based alternative,[4] as if the concept of a market-based surrogate itself is unacceptable. This simply is not the case -- not as a matter of law pursuant to Section 276 of the Act and the IPTA opinion, not as a matter of basic economics, not as a matter of regulatory practice, and not as a matter of common sense. Government regulators have the option of using surrogates to ascertain how a market values a particular service. The Commission should reject the notion that it is required to base prices on something other than a surrogate, namely "costs," as advocated by

[4] It is well settled that once the Commission acted within its expertise and discretion, while relying on the record before it, parties opposing that action bear the burden of saying why the action is not correct. FCC v. WNCN Listeners Guild, 450 U.S. 582, 593-596 (1981); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 813-814 (1978). AT&T's attempts to substitute its views for those of the Commission, without demonstrating why a market-based compensation rate cannot function, should therefore be rejected.

AT&T. As APCC demonstrates throughout this Opposition, the cost data submitted by the IXCs in this proceeding is highly suspect, while the market-based surrogates, including the local coin rate, are quite reliable -- both economically and intuitively.

A. The Court of Appeals did not vacate use of the local coin rate as a benchmark for dial-around compensation

Some of the petitioners, primarily AT&T, contend that the Commission cannot rely on the local coin rate as a benchmark for the dial-around rate because the Court of Appeals vacated the use of a market-based compensation rate based on the deregulated rate for local coin calls. AT&T at 2. This contention is without merit. AT&T and Mtel are also wrong when they claim that the Commission has essentially readopted its original rule.[5] Id. at 3; Mtel at 6-7. The Commission has in no way defied the Court, nor has it readopted the vacated rule.

The Commission's original order prescribed a compensation rate equal to the local coin rate (or an initial rate of $0.35). It was this decision, to set the "dial-around" rate equal to the local coin rate, that the Court found unjustified. IPTA, 117 F.2d at 563. The Commission had set the rate equal to the local coin rate because it found that costs were similar. The Court found that the FCC failed to address record evidence indicating that the costs of the two types of calls are not similar. 117 F.2d at 563-64. On remand, the Commission expressly addressed this ruling by the Court by examining in detail the cost relationships between local coin calls and dial-around calls. The Commission estimated that there was approximately a 6.6 cents per call difference between the average per-call costs attributable to the two types of calls. The Commission decided to continue to tie dial-around compensation to a market-based rate (the

[5] In this instance, the "rule" that was allegedly readopted is the rule setting the rate. 47 CFR Section 64.1300(c).

local coin rate), but to adjust the rate to take account of the cost difference. The Commission therefore set dial-around compensation at a level 6.6 cents less than the local coin rate.[6] Although APCC disagrees with some aspects of the Commission's analysis, the Commission's overall analytic approach responded directly and forthrightly to the precise issue identified in the Court's opinion.

B. The deregulated local coin rate is a reasonable market-based surrogate for per-call compensation

AT&T also argues, apart from the scope of the IPTA holding, that the Commission ignored "overwhelming evidence" that a market-based rate that relies on the local coin rate is "internally inconsistent and contrary to sound economic theory," because "local coin calls and coinless toll calls are independent goods." Id. at 4. See also Mtel at 6-7.

In contending that that local coin calls and subscriber 800 calls are two distinct types of calls with different market characteristics, AT&T reasons that local coin calls are subject to a "final" demand, while subscriber 800 calls face a "derived" demand. AT&T Petition at 5.[7] It

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[6] Not only is the new rate 6.6 cents less than the vacated rate, it is more than ten cents less than the $0.40-per-call dial-around rate initially established by the Commission in 1992.

[7] As noted above, AT&T economic analysis relies extensively on the affidavit of economist Frederick R. Warren-Boulton. This affidavit was submitted in response to the Commission's remand NPRM with AT&T's reply comments, which was quite convenient and advantageous for AT&T because it meant that the analysis would remain unchallenged by the other reply commenters. Now AT&T has resurrected this analysis, as if its "unchallenged" status gives it extra weight. The Commission should recognize this ploy and need not address in detail each of the many peripheral arguments that are, in some cases, the third and fourth bites at the apple for the IXCs, and that, in any event, become irrelevant once the core argument of the Warren-Boulton affidavit is refuted. As for the latter, the Commission will find that the "internally inconsistent" and "final vs. derived demand" framework that AT&T attempts to devise bears no resemblance to the payphone marketplace as evolved under the plan adopted by the Commission.

further contends that relationship between the participants in the "two markets" is fundamentally different, because the caller does not directly compensate the PSP when making a subscriber 800 call. Id. at 6. According to AT&T, even if the market for local coin calls is competitive, that does not make the market for subscriber 800 calls competitive. Id. at 5-7. See also CBC at 18-21; DMA at 4-5; Mtel at 7; Source One at 5.

AT&T's "independent goods" argument misses the mark. There are obvious and important similarities between local coin calls and dial-around calls that amply justify the FCC's decision to use the local coin rate as a benchmark, at least in absence of a better surrogate. The seller in both cases -- the payphone provider -- is the same. The product in both cases -- use of the payphone to originate a call -- is also the same. The difference -- on which AT&T seizes -- is that the buyer may not always be the same. While the buyer of a local coin call is the caller, the buyer of a dial-around, and most particularly a subscriber 800 call,[8] is not always the caller.

AT&T 's reliance on a "final" demand vs. "derived demand" is also misplaced. In a sense, AT&T accuses the Commission of failing to recognize a fault in the competitive marketplace, when the Commission's plan, in fact, corrects that problem. It is true that local coin callers are subject to "final" demand, because the caller directly pays for the call. But that analysis also applies to subscriber 800 under the Commission's payphone proceeding.

Before the Commission adopted a default compensation rate for subscriber 800 calls, the market was significantly distorted because callers were not paying for the service provided by PSPs -- the ability to make a call. After the promulgation of the Commission's rules, however,

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[8] In the case of an access code dial-around all, the buyer usually is the caller, who merely uses a calling card, credit card or "prepaid" card instead of coins.

PSPs received their legitimate compensation through the IXCs. The payment stream does not necessarily end with the IXCs, however. Instead, the IXCs can and do pass the payphone compensation rates on to their subscribers. In turn, 800 subscribers can and do pass on the charges to their customers through a direct surcharge for using a payphone. The payment stream flows ultimately from the PSP -- as payee -- back to the originator of the call -- as payor.[9] Thus, the Commission's rules serve to change the demand for a call from "derived" to "final" by bringing back to the caller the economic consequences of its actions in making a call from a payphone. If any party along the payment stream chooses to absorb the costs of payphone compensation -- for whatever marketing customer relations, etc., reason -- rather than pass it downstream,[10] then that party has made a permissible marketing decision and whatever the effect of that decision on the fundamental demand structure for the call, it is a market-driven decision. Thus, the effect of the FCC's ruling is to allow the dial around compensation to be a "final demand" product, depending on the market decisions made by various parties is the market choice.

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[9] For example, a box-office ticket service that sells show tickets over the phone could include a $.035 surcharge to the overall charge whenever a customer makes a call from a payphone. This payphone surcharge would be analogous to the service charge that the ticket service already includes over and above the face value of the ticket. Similarly, a rental car company could add a payphone surcharge to the bills of customers who reserve cars from payphones.

[10] If an IXC chooses <u>not</u> to pass a payphone surcharge on directly to its customer, then it has made a permissible marketing decision to absorb the costs of payphone compensation, electing to keep the demand for the service provided by the PSP "derived" rather than making it "final." For example, most IXCs today charge the same rate for 0+ calling card calls, whether the call is originated by a payphone or a subscriber's telephone. This marketing decision by the IXCs keeps the demand for use of the payphone "derived" even though the IXCs could easily transform it into "final" demand.

To put it in slightly different terminology, without in any way changing the underlying analysis, the Commission followed what has been a consistent theme in the deregulation of the telecommunications industry over the past three decades: it "unbundled" all of the elements of a call originated at a payphone, and it gave the caller an ability to make an individual economic choice about which payphone to use to make a call -- or whether to use a payphone at all. Previously, before the Commission's payphone proceeding, the price of using a payphone when making a coinless toll call was bundled into the price of long distance calls.[11] By unbundling the payphone element, the Commission has eliminated the cross-subsidies for coinless payphone calls. By making it possible to hold callers responsible for the consequences of their economic choices, the Commission has effectively put them in charge as well.[12] It has enhanced consumer choice, while simultaneously correcting a major malfunction in the payphone marketplace (PSPs not getting compensated for subscriber 800 calls).[13]

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[11] This pre-existing situation could be classified as "derived" demand under AT&T's analysis, and is distinct from the "final" demand status possible at all payphones under the Commission's plan.

[12] Petitioners favoring a "caller-pays" compensation system, as discussed below, argue that such a system permits the "cost causers" to determine whether or not they wants to make a payphone call. These petitioners fail to acknowledge, however, that the "carrier-pays" system adopted by the Commission also achieves the same result: "carriers [may] recover their own costs . . . through direct charges to access code call or subscriber 800 customers." Payphone Order at para. 83. In effect, the IXC and its customers have the ability to convert the current compensation system to a final-demand, caller pays system.

[13] Complaints by 800 subscribers that the cost of compensation will have impact on the price of the goods and services they sell fail to acknowledge that the cost of originating these 800 calls were previously borne by PSPs without any compensation whatsoever. For several year, 800 subscribers have been economic free riders in telecommunications marketplace. Accordingly, their arguments about the impact of having to pay their fair share count add nothing to the analysis. APCC, on the other hand, requests only that its members receive "fair" compensation for the service it provides.

AT&T also contends, through its affiant Dr. Warren-Boulton, that by linking the local coin rate to the default compensation rate for subscriber 800 calls, the Commission encourages the PSP to raise the price of local coin calls above the profit maximizing level as a way of generating more revenue from originating dial-around calls. AT&T at 5. Such an argument assumes that the premises owner has no ability or incentive to control the prices charged by payphones at its location. If that were true, it would presumably be because the premises owner or business is not interested in whether or not it offends its customers and has little interest in keeping those customers. Alas, such is not the behavior of businesses in an increasingly competitive world. Even businesses like airports face substantial competition today.[14] Each business that has payphones on its premises has a strong incentive to keep the price charged at those payphones "fair."

AT&T's "above the profit maximizing level" argument is also falsely premised on the notion that charging higher local coin rates would benefit to the PSP because local coin calls and dial-around calls are somehow limited. AT&T's first assumption appears to be that the marketplace for these calls is not competitive. The Commission concluded otherwise. See, e.g., Payphone Order at paras. 11-19. AT&T's second apparent assumption is that the payphone callers have no power in the marketplace. On the contrary, callers have real power in this competitive marketplace. They can defer their calls until they get home or find a payphone with a price more to their liking. In addition, callers can exert pressure on premises owners to reduce

[14] For example, the District of Columbia has three convenient, competitive airports from which to choose: National, Dulles International, and Baltimore/Washington International. Similarly, New York City has three such airports: Kennedy, LaGuardia, and Newark. Both locations, especially New York, have smaller, suburban airstrips within their metropolitan areas. Anyone who listens to the radio or reads a newspaper is aware that these airports compete for passengers by touting their conveniences and amenities.

rates charged at payphones. Finally, AT&T also appears to assume that the compensation rate for subscriber 800 calls will always equal the local coin rate. This is completely false. The local call compensation rate was purposely created to be a default rate, subject to negotiation to achieve a more accurate market-based rate: the rate at which a willing seller and a willing buyer can agree. Payphone Order at para. 52. Therefore, AT&T's analysis is wrong because it is based on numerous assumptions that fail to consider that the competitive market acts as a check on what could otherwise be an incentive to price one type of payphone call uneconomically. In short, any time a PSP sets its rate for local coin calls or any other calls too high, the marketplace will force a correction -- uneconomic pricing cannot persist under the Commission's deregulatory, market-based approach.

In absence of using a better surrogate like 0+ commissions, the FCC has every justification in using the deregulated local coin rate as a benchmark for a market-based compensation rate. A well-functioning competitive market (as with local coin calls) for the same basic product (originating a payphone call) provides an excellent model from which to prescribe a rate for a market that faces some different competitive characteristics (dial-around calls) but which is essentially the same.

While AT&T elaborately explains why the 800 subscriber allegedly does not have the same ability as a payphone caller to participate in the payphone marketplace, the explanation merely shows, at most, why the dial-around market may not function well enough to arrive at a market-based dial-around rate without the regulatory intervention mandated by Congress. It does not explain why the Commission cannot legitimately use a payphone market that does function --

the local coin market -- as a source of a market-based surrogate to prescribe a rate for the malfunctioning dial-around market.

Petitioners' arguments that there is no tie between the compensation rate for dial-around calls and the deregulated local coin rate are unconvincing. On the contrary, the deregulated local coin rate serves as one of the best measures of value to the caller of being able to make a coinless call.

C. It is entirely appropriate, as a matter of law and public policy, to base compensation on a market-based surrogate

AT&T and others, however, claim that the Commission failed to address a different concern allegedly identified in the Court's opinion -- the alleged lack of justification for using a market-based surrogate or benchmark, as opposed to pure cost analysis, in the first place. This concern is simply not expressed in IPTA. To the extent that the Court focused on the propriety of market-based ratemaking, it explicitly endorsed such an approach. IPTA, 123 F.2d at 562 (approving the Commission's reliance on market forces to keep local coin rates at a reasonable level). The Court neither indicated that a market-based rate could not serve as a benchmark for setting the dial-around rate, nor did it hold that the deregulated local coin rate was an appropriate market-based benchmark, provided that the issue of cost differences was addressed by the Commission. Therefore, the Commission was correct when it stated that "we find no statement in the court's decision that precludes us from relying on market-based surrogates[.]" Second Report and Order at para. 23. In addition, the Communications Act requires that compensation for all payphone calls be "fair." This statutory goal could not be achieved with the cost-based compensation advocated by AT&T.

While basing compensation for dial-around calls on the deregulated local coin rate at each payphone provides an adequate measure of the value to the caller of the ability to make a call, contrary to arguments by AT&T, the Commission is also free to adopt additional, better measures of value to support its adoption of a market-based rate. The prevailing $0.35 local coin rate, subject to the cost adjustments made by the Commission, provides a compensation rate that APCC believes is at the low end of the range of possible market-based rates. APCC has shown that use of the deregulated local coin rate, while permissible under the Court's IPTA opinion, actually under-compensates PSPs for their total costs -- about $0.45 per call -- in originating dial-around calls. See generally APCC Comments at 10.

1. 0+ Commission levels

The best measure of the value to a caller of a dial-around call are 0+ commission rates, because they are the only known instance where carriers and PSPs meet in the marketplace to negotiate a price for the routing of calls from the payphone to the carrier. As such, 0+ commission levels can be considered a logical, reasonable approximation of the price that would be agreed upon if it were possible to have free negotiations over the price for routing dial-around calls.

The Commission has expressly recognized, in CC Docket No. 91-35, that basing dial-around compensation on AT&T 0+ commissions is a "reasonable approach." Policies and Rules Concerning Operator Service Access and Payphone Compensation, Second Report and Order , 7 FCC Rcd 3251, 3257 (1992). In this proceeding, however, the Commission rejected the use of 0+ commission levels on the grounds that use of such data might "overcompensate" PSPs because it includes compensation for such factors as a PSP's promotion of the presubscribed carrier through placards on the payphone. Payphone Order at para. 69; Second Report and Order at para. 98. In addition, the Commission states that its "approach is based on the costs of a low traffic location that does not support commission payments. Second Report and Order at para. 98.

The Commission has the option of relying on 0+ commission data as a benchmark, particularly after it previously relied on 0+ commission levels for the same purpose. APCC Comments at 7-8. There is no reason to believe that the commissions paid to PSPs includes any substantial element of compensation for "placard" promotion, especially in the case of a carrier such as AT&T, which always employs numerous other methods of promoting its operator services. See APCC 1996 Comments at 8-9 and Remand Comments at 7-9. With regard to its statement about "low traffic locations," it is not inconsistent to use 0+ commission levels at payphones as an independent measure of value for the price of a coinless call. Whether or not a particular payphone generates 0+ commissions, as contemplated by the FCC, goes to the overall costs in calculating adjustments to the default compensation amount based on the local coin rate -- a completely different surrogate. Even "low traffic location" payphones are eligible for 0+ commissions whenever a call is placed using the presubscribed carrier.

The data submitted in 1996 by APCC showed that AT&T's average commission levels ranged from $0.45 to $0.80 per call. APCC 1996 Comments at 32.[15] The middle of this range is $0.625 per call. Of course, even these estimates of 0+ commission levels are likely to be somewhat low, given that AT&T's commissions have historically been lower on a per-call basis that those of other IXCs.

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[15] The RBOCs estimated a somewhat higher range of AT&T commissions, from $0.78 to $1.14 per call. RBOC Comments at 25.

2. 0- transfer rates

As previously recognized by the Commission, 0- transfer rates, while not as close surrogates as 0+ commissions, are a reasonable surrogate for dial-around compensation because they indicate the minimum price that IXCs are willing to pay to obtain telephone traffic. Policies and Rules Concerning Operator Service Access and Payphone Compensation, Second Report and Order , 7 FCC Rcd 3251, 3257 (1992). Evidence provided earlier by the RBOC Coalition indicates that the average price of a 0- transfer call (adjusted for the presence of unanswered calls) is $0.42 to $0.49 cents per call. RBOC Comments at 12. APCC has noted that it recently surveyed seven of the top eight LECs, and determined that their average unadjusted 0- transfer rate is $0.31 per call.[16] APCC Comments at 9. When adjusted for unanswered calls (using the RBOC Coalition's factors, which averaged about 75%), the average price of a completed 0- transfer call is $0.41 per call. Id.[17]

3. Sent-paid toll call charges

Another reasonable indicator of the market price of using a payphone is the surcharge applied by a PSP for sent-paid toll calls. This represents the amount, over and above the standard transmission charge, that a payphone provider charges for the convenience of making a toll call from a payphone. APCC has submitted record data previously that show that AT&T and LEC tariffed charges indicated that sent-paid surcharges range from $0.75 to $2.05 per call. See

[16] In its previous comments, APCC listed the transfer rates as follows: Ameritech, $0.28; BellSouth, $0.35; NYNEX, $0.30; Pacific Bell, $0.30; Southwestern Bell, $0.282; and GTE, $0.35. Data for US West was unavailable. APCC Comments at n. 9.

[17] The Commission did not specifically address in the Second Report and Order the use of 0- transfer charges as a market-based surrogate.

APCC 1996 Comments at Attachment 3 and Remand Comments at 10. See also IPTA 1996 Comments at 12 ($0.95 per call). The middle of this range is $1.40 per call.[18]

* * *

While the local coin rate provides a reasonable measure of the value to the caller of being able to make a dial-around call, 0+ commission data provides a better, more logical basis for dial-around compensation. It also will lead to rates that, while slightly higher than those adopted by the Commission, more accurately reflect a compensation rate that will ensure the "widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. Section 276(b)(1). See also RBOC Comments at 24, 32. The other measures of value discussed above by APCC also provide alternative or additional rationales for a market-based compensation rate. APCC has estimated that the simple average of market-based surrogates, including local coin calls, 0+ call commissions, and sent-paid toll surcharges, is about $0.80 per call. APCC Comments at 10. A weighted average based on average numbers of each type of call is roughly $0.45 per call. Id.[19]

The Commission had similar data on each of the market-based surrogates discussed above on the record when it adopted both the Payphone Order and the Second Report and Order. The Commission's adoption of the deregulated local coin rates as a market-based surrogate was a selection from several equally viable market-based surrogates -- each of which would have been

[18] Once again, the Commission did not specifically address in the Second Report and Order the use of sent-paid toll call charges as a market-based surrogate.

[19] The RBOCs propose adjusting AT&T 0+ commissions by the average revenue on subscriber 800 calls to reach a compensation rate of between $0.39 and $0.57 per call. RBOC Comments at 26. The middle of the RBOCs' range is $0.48 per call.

a perfectly valid basis for compensation.[20] In fact, use of each of the alternative market-based surrogates would have yielded a higher per-call rate of compensation for PSPs.

APCC has disagreed with the Commission's adoption of the local coin rate as a market-based surrogate, because that rate, contrary to the claims of AT&T and others, under-compensates PSPs for the service they provide. APCC recognizes, however, that the Commission's adoption of the local coin rate surrogate was a compromise between the PSPs and other members of the industry. In its expertise and discretion, the Commission reviewed the record of the proceeding and selected the local coin rate as a market-based surrogate. It concluded that adoption of such a surrogate was in the public interest because it produced a rate that would allow a more flexible, conceptually easy transition from the subsidy-ridden payphone operations of the past to the current competitive marketplace. The local coin rate surrogate also met the "fair" compensation test established by the Commission: the rate at which a willing seller and a willing buyer agree. Payphone Order at para. 52.

In the spirit of the compromise, which the Commission's payphone proceeding represents, APCC supported the end result (a market-based surrogate using the deregulated local coin rate at

[20] Courts have approved the use of market-based surrogates such as those on the record in this proceeding. See, e.g., Amusement and Music Operators Association v. Copyright Royalty Tribunal, 676 F.2d 1144 (7th Cir. 1982) (upholding the Copyright Royalty Tribunal's decision to raise the compulsory license fee for jukeboxes from $8 per box to $50 per box based on "marketplace analogies). Even in the context of "just and reasonable" ratesetting for common carriers, courts have repeatedly endorsed comparable rate analogies as appropriate ratemaking devices. See, e.g., San Antonio v. United States, 555 F.2d 637, 641-43 (8th Cir. 1977). In the payphone context, which is not subject to a "just and reasonable" carrier-oriented standard, and which the Commission has found to be workably competitive, the use of "marketplace analogies," such as those employed in the jukebox case is clearly more appropriate than an attempt to base compensation on the dynamic and difficult-to-assess cost factors characteristics of a highly competitive marketplace.